(1)

86-625

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTION PRESENTED

Section 526 of the Tariff Act of 1930, 19 U.S.C. 1526, restricts the unauthorized importation of foreign merchandise bearing a trademark that is registered in the United States Patent and Trademark Office and owned by a United States citizen, corporation, or association. The question presented in this case is whether a Customs Service regulation is valid which permits the importation of foreign merchandise bearing a trademark identical to a U.S. registered trademark when (1) the foreign and U.S. trademark are owned by the same person; (2) the foreign and U.S. trademark owners are subject to common ownership or control; or (3) the trademark was applied under authorization of the U.S. trademark owner.

PARTIES TO THE PROCEEDING

The petitioners are the United States of America, James A. Baker III, Secretary of the Treasury, and William von Raab, Commissioner of Customs (defendant-appellees below). The respondents are:

Coalition to Preserve the Integrity of American Trademarks (ÇOPIAT), plaintiff-appellant;[1]

Cartier, Inc., plaintiff-appellant;

Charles of the Ritz Group, Ltd. (a subsidiary of Squibb Corporation), plaintiff-appellant;

K mart Corporation, intervening defendant-appellee; and

47th Street Photo, Inc., intervening defendant-appellee.

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[1] COPIAT is a non-profit organization composed of the following members: AC & R Advertising, Inc.; Advertising to Women, Inc.; Alfin Fragrances, Inc.; American Cyanamid Co./Jacqueline Cochran, Inc.; Elizabeth Arden, Inc.; Baccarat, Inc.; Sinar Bron, Inc.; Cartier, Inc.; Citizen Watch Company of America, Inc.; Charles of the Ritz Group, Ltd.; Cosmair, Inc.; Coty/Division of Pfizer; G.M.I. Photographic, Inc.; Halston Fragrances, Inc.; Victor Hasselblad, Inc.; E. Leitz, Inc.; Maier & Berkele; Michelin Tire Corp.; Minolta Corp.; Nikon, Inc.; North American Watch Corp.; Paco Rabanne Parfums; Parfums Stern, Inc.; Parfums Worth Corp.; Redken Laboratories, Inc.; Revlon, Inc.; Robertet, Inc.; Schneider Corp. of America; Seiko Corp. of America; Tokina Optical Corp.; Warner Cosmetics Inc.; Waterford Crystal, Inc.; Carl Zeiss, Inc.; American Watch Ass'n; Electronics Industry Association-Consumer Electronics Group; and Jewelers of America, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, James A. Baker III, Secretary of the Treasury, and William von Raab, Commissioner of Customs, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-32a), is reported at 790 F.2d 903. The opinion of the district court (App., *infra,* 34a-48a), is reported at 598 F. Supp. 844.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 51a-52a) was entered on May 6, 1986. Petitions for rehearing were denied on July 18, 1986 (App., *infra,* 53a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 526(a) of the Tariff Act of 1930, 19 U.S.C. 1526(a), provides in pertinent part as follows:

> Except as provided in subsection (d) [governing importation of items for personal use], it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States * * *, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury * * *, unless written consent of the owner of such trademark is produced at the time of making entry.

The relevant Customs Service regulations provide in pertinent part as follows (19 C.F.R. 133.21):

* * * * *

> (b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.
>
> (c) *Restrictions not applicable.* The restrictions set forth in [paragraph (b)] of this section do not apply to imported articles when:
>
> (1) Both the foreign and the U.S. trademark or trade name are owned by the same person or business entity;
>
> (2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) and 133.12(d));
>
> (3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner;

* * * * *

STATEMENT

This case concerns the importation into the United States of goods manufactured abroad by affiliates of the U.S. trademark owners. Many foreign firms that manufacture and sell goods abroad have U.S. subsidiaries that register and own the U.S. trademarks and act as "authorized U.S. distributors" for their merchandise. Many U.S. firms that own U.S. trademarks have foreign affiliates that manufacture their goods, apply their marks, and sell the goods abroad. In either situation, the question arises whether an importer may, without the consent of the U.S. trademark owner, bring into the United States goods produced abroad by the foreign affiliate of the U.S. trademark owner and bearing a mark identical to the U.S. trademark.

Domestic retailers have discovered that they can provide American consumers with genuine foreign-made goods at substantial savings (as compared with prices charged by retailers who have bought directly or indirectly from the U.S. trademark owner) by purchasing the goods from overseas sources and importing them. Genuine goods manufactured abroad and imported without the permission of the U.S. trademark owner have come to be called "gray market" goods, and the process of importing them has come to be called "parallel importation." Proponents of such importation contend that it is a response to price discrimination between foreign and U.S. markets. Opponents, the U.S. trademark owners, contend that such importation constitutes a misappropriation of the goodwill embodied by the trademark and thus violates their rights. The question in this case is whether Section 526 of the Tariff Act of 1930, 19 U.S.C. 1526, requires the Customs Service to block entry of gray market goods produced by a foreign affiliate of the U.S. trademark owner.

1. Section 526(a) of the Tariff Act of 1930 prohibits the unauthorized importation of "any merchandise of foreign manufacture if such merchandise * * * bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States * * *." 19 U.S.C. 1526(a). Section 526 plainly prohibits entry of foreign merchandise bearing a U.S. trademark if a foreign manufacturer has sold his interest in the U.S. trademark to an unaffiliated U.S. citizen or company. Indeed, Section 526 was enacted for the specific purpose of "protecting the property rights of American citizens who have purchased trade-marks from foreigners" (62 Cong. Rec. 11603 (1922) (Sen. Sutherland)).[2]

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[2] This issue came to prominence in *A. Bourjois & Co.* v. *Katzel*, 274 F. 856 (S.D.N.Y. 1920), rev'd, 275 F. 539 (2d Cir. 1921), rev'd, 260 U.S. 689 (1923), a case involving importation of "Poudre Java," a French face powder. A. Bourjois & Co. (Bourjois), a U.S. company, acquired from Wertheimer & Cie., a French partnership, the French company's U.S. cosmetics business, including the U.S. trademark and exclusive domestic right to repackage and sell Poudre Java, an internationally recognized product. Eight years later, Bourjois brought a trademark infringement action against another domestic party—Katzel—that purchased that product overseas and sold it in the original French packaging, marked "Poudre de Riz de Java." The district court entered a preliminary injunction enjoining Katzel's parallel importation. 274 F. at 860. The Second Circuit reversed, concluding that "[i]f the goods sold are the genuine goods covered by the trade-mark, the rights of the owner of the trade-mark are not infringed." 275 F. at 543.

In response to this decision, Congress enacted Section 526 of the Tariff Act of 1922, which restricted the importation of foreign-made merchandise bearing a domestic trademark by persons other than the owner of the U.S. trademark (42 Stat. 975). The Supreme Court, in a brief opinion by Justice Holmes, reversed the *Katzel* decision shortly after enactment of the Tariff Act of 1922. 260 U.S. 689 (1923). Congress later reenacted Section 526, in substantially identical form, in the Tariff Act of 1930, ch. 497, 46 Stat. 741.

For over 50 years, the Customs Service has interpreted Section 526 to permit entry of foreign merchandise bearing a trademark identical to a U.S. registered trademark when there is a substantial identity between the foreign manufacturer and the U.S. trademark owner.[3] The present regulation permits parallel importation when (1) the foreign and U.S. trademark are owned by the same person; (2) the foreign and U.S. trademark owners are subject to common ownership or control; or (3) the U.S. trademark was applied under authorization of the U.S. trademark owner. 19 C.F.R. 133.21.

2. The "Coalition to Preserve the Integrity of American Trademarks" (COPIAT), an association organized to represent the interests of U.S. trademark owners, brought suit against the United States, the Secretary of the Treasury, and the Commissioner of Customs challenging the Customs Service's longstanding regulation.[4] COPIAT urged that the regulation is inconsistent with both Section 526 and Section 42 of the Lanham Act, which forbids the importation of goods bearing marks that "copy or simulate" U.S. trademarks (15 U.S.C. 1124). Two retailers of parallel imports, K mart Corporation and 47th Street Photo, Inc., intervened as defendants.

The district court concluded that the regulation is valid (App., *infra,* 44a-48a). The court first addressed 47th Street Photo's motion to dismiss (*id.* at 36a). That party, relying on the Federal Circuit's decision in *Vivitar Corp.* v. *United States,* 761 F.2d 1552 (1985), cert. denied, No. 85-411 (Jan. 13, 1986), argued that the Court of Interna-

[3] See 19 C.F.R. 133.21 (1979); 19 C.F.R. 133.21 (1973); 19 C.F.R. 11.14 (1960); 19 C.F.R. 11.14 (1953); 19 C.F.R. 11.14 (1947); 19 C.F.R. 11.14 (1943); T.D. 48,537, 70 Treas. Dec. Int. Rev. 336 (1936).

[4] Two members of COPIAT—Cartier, Inc. and Charles of the Ritz Group, Ltd.—were also named plaintiffs. All three plaintiffs are collectively described as "COPIAT." A full list of COPIAT's members is set out under "Parties to the Proceeding."

tional Trade has exclusive jurisdiction, pursuant to 28 U.S.C. 1581, over challenges to Customs Service regulations interpreting Section 526. It also argued that Section 42 of the Lanham Act does not apply in the present case because that provision forbids only the importation of counterfeit or spurious trademarks. The court rejected 47th Street Photo's jurisdictional contention but agreed that the Lanham Act claim should be dismissed (App., *infra,* 37a-39a). The court then addressed COPIAT's claim that the regulations are inconsistent with Section 526 (App., *infra,* 39a-48a). The court concluded that the regulations represent a "sufficiently reasonable" interpretation of the statute, "supported by the legislative history, judicial decision, legislative acquiescence, and the long-standing consistent policy of the Customs Service" (*id.* at 48a). The court added that "[t]he regulations clearly implement the limited purpose for which section 526 was enacted" (*ibid.*).

The court of appeals affirmed the district court's jurisdictional determination (App., *infra,* 4a-8a) but reversed that court's determination that the regulations are valid (*id.* at 8a-31a). The court of appeals stated that "Section 526 does not, on its face, admit of any exceptions based upon the relationship of the American and foreign trademark owners or upon whether the American owner has authorized the use of the trademark abroad" (*id.* at 10a). Finding no ambiguity in the statutory language, the court refused to give deference to the Customs Service's regulatory interpretation. The court examined the purpose (*id.* at 11a-14a), legislative history (*id.* at 14a-21a), and judicial and administrative interpretations (*id.* at 21a-28a) of Section 526, concluding that "the Customs regulations cannot be upheld as a reasonable construction by the Customs Service of a statute it is charged with enforcing" (App., *infra,* 29a).

The court of appeals also rejected the district court's conclusion that the history of the Customs Service regulations "reveals 'a pattern of legislative acquiescence' " (App., *infra,* 29a (quoting *id.* at 46a)) and the Federal Circuit's prior decision that the Customs Service regulations may be upheld " 'as a reasonable exercise of administratively initiated enforcement' " (*id.* at 31a (quoting *Vivitar Corp.* v. *United States,* 761 F.2d at 1571)). The court of appeals nevertheless concluded that "injunctive relief is inappropriate at this juncture of the controversy" (App., *infra,* 32a) and remanded the case to the district court with instructions (*ibid.*) "to issue a declaratory judgment that the Customs regulations in question, 19 C.F.R. § 133.21(c)(1)-(3) are contrary to Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526, and hence unlawful."[5]

REASONS FOR GRANTING THE PETITION

This case presents a question of great practical importance to manufacturers, distributors, retailers and consumers of merchandise produced abroad. The case is likewise important to the United States, the Department of the Treasury, and the Customs Service, which must administer the laws governing import restrictions. The decision of the court of appeals conflicts with decisions of the Federal and Second Circuits, which have upheld the validity of the Customs Service regulations. The practical result of that conflict is that a Customs Service decision either to exclude or to admit parallel imports can be successfully challenged. This Court's review is therefore plainly warranted.[6]

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[5] The court did not address the Lanham Act claim (App., *infra,* 9a). Following its decision, the court of appeals issued a stay of the mandate until September 30, 1986 (*id.* at 33a).

[6] We believe that the court of appeals correctly rejected the Federal Circuit's determination in *Vivitar* (761 F.2d at 1560) that the Court of

1. The Customs Service regulations at issue in this case have major commercial importance. American consumers spend millions of dollars on foreign manufactured products—including cameras, watches, perfumes, fashions, and electronic equipment—that are available at discount prices through parallel importation. Domestic retailers such as 47th Street Photo and K mart, relying on the Customs Service's longstanding regulations, have established extensive business enterprises based on parallel importation. They maintain that "[p]arallel importation permits American consumers to buy foreign-manufactured goods at costs substantially below the artificially high prices fixed by the international enterprises and their 'authorized' American distributors, who know that a restricted American market will support higher prices than the open international market" (47th Street Photo C.A. Br. 3-4).

The United States, the Department of the Treasury, and the Customs Service consider the Customs Service regulations an established element of the Nation's foreign trade policy.[7] The regulations, which reflect the Customs Service's interpretation of a statute that Congress has charged it with administering, have been part of this country's international commercial policy for over 50 years. The court of appeals' decision, if left standing, would result in a serious disruption of established business practices and settled commercial expectations.

International Trade has exclusive jurisdiction over challenges to the government's enforcement of Section 526. See App., *infra*, 8a. We therefore limit our petition for a writ of certiorari to the question whether the Customs regulations are valid.

[7] The Administration is nevertheless studying the present policy implications of parallel importation. See 49 Fed. Reg. 21453 (1984); *id.* at 29509. The Customs Service recently requested public comment on the feasibility of imposing labeling or demarking requirements on parallel imported goods. See 51 Fed. Reg. 22005 (1986); *id.* at 30024.

2. The court of appeals' decision is in direct conflict with decisions of other courts of appeals affirming the validity of the Customs Service regulations. The Federal Circuit, prior to the *COPIAT* decision, had upheld the Customs Service regulations as an appropriate exercise of enforcement discretion. *Vivitar Corp.* v. *United States,* 761 F.2d at 1571. That court did not agree with the government's interpretation of Section 526 but did acknowledge that the statute may contain "implied limitations." 761 F.2d at 1570. See also *id.* at 1572 (Davis, J., concurring). The D.C. Circuit specifically rejected the Federal Circuit's reasoning (App., *infra,* 31a).

The Second Circuit has since refused to follow the *COPIAT* decision. *Olympus Corp.* v. *United States,* 792 F.2d 315 (1986). That court, facing a similar challenge to the Customs Service regulations, concluded that "congressional acquiescence in the longstanding administrative interpretation of the statute legitimates that interpretation as an exercise of Customs' enforcement discretion" (*id.* at 320). The Second Circuit expressly addressed the D.C. Circuit's decision, stating (*id.* at 321 n.1):

> We disagree with that court's conclusion that "the Customs Service's interpretation of Section 526 does not display the necessary 'thoroughness, validity, and consistency' to merit judicial acceptance," [App., *infra,* 28a, quoting *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981)], at least in the face of congressional acquiescence in that interpretation.

The D.C. Circuit's decision thus presents a square conflict with two other courts of appeals. The conflict between the Federal Circuit and the D.C. Circuit is particularly serious because those courts disagree on both the jurisdictional and the merits issues involved in this dispute. As previously noted (see pages 5-6, 7 note 6, *supra*), the Federal Circuit ruled in *Vivitar* that the Court

of International Trade has exclusive jurisdiction over disputes arising from the Customs Service's enforcement of Section 526, while the D.C. Circuit ruled in *COPIAT* that the district courts can exercise jurisdiction over third party challenges to the admission of trademarked goods. Thus, an importer, relying on the Federal Circuit's *Vivitar* decision, can invoke the jurisdiction of the Court of International Trade and successfully challenge a Customs Service decision to exclude parallel imports, while the owner of the U.S. trademark, relying on the D.C. Circuit's *COPIAT* decision, can invoke the jurisdiction of the United States District Court for the District of Columbia and successfully enjoin admission of those goods. An administrative stymie exists as long as both decisions remain in force. Under these circumstances, this Court's review is plainly warranted.[8]

3. On the merits, we submit that the court of appeals should have upheld the Customs Service regulations essentially for the reasons explained in our brief in opposition to Vivitar Corporation's petition for a writ of certiorari to the Federal Circuit. See U.S. Br. in Opp., *Vivitar Corp.* v. *United States,* cert. denied, No. 85-411 (Jan. 13, 1986). As we stated there, Section 526 was apparently enacted for the limited purpose of protecting American companies that purchase trademarks from independent foreign manufacturers (U.S. Br. in Opp. at 7-12). The Customs Service—an expert agency charged with administration of the provisions—has consistently interpreted Section 526 as intended to reach a class of cases narrower than the full range of cases it might literally be read to cover (U.S. Br. in Opp. at 9-11), and Congress has never overruled that

[8] The plaintiff in *Olympus Corp.* has indicated that it will file a petition for a writ of certiorari and requested an extension of time from this Court, to and including November 6, 1986, in which to file its petition. See *Olympus Corp.* v. *United States,* No. A-147 (Aug. 23, 1986). Justice Marshall granted that request on August 27, 1986.

interpretation, despite a number of opportunities to do so (*id.* at 11). The Customs Service regulations have been in place, largely unchanged and (until recently) unchallenged, for over 50 years. Domestic distributors and retailers, in turn, have relied on the longstanding Customs Service policy, narrowing the reach of the statute, in structuring their business operations. Under these circumstances, the Customs Service regulations should remain in force until Congress or the implementing agency acts to change them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Civil Action No. 84-00390)
No. 84-5890

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Argued January 22, 1986
Decided May 6, 1986

Before MIKVA, BORK, and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This case concerns the validity of regulations issued by the U.S. Customs Service permitting the importation of so-called "grey-market goods" in certain instances. These are goods manufactured abroad bearing legitimate foreign trademarks that are identical to American trademarks. This situation typically arises when a foreign producer creates an American subsidiary that then registers the American trademark. Both the foreign producer and its American subsidiary often wish distribution in the United States to be exclusively controlled by the American subsidiary. If, however, the price

at which the American subsidiary sells the goods exceeds the price at which the goods are sold abroad, other importers have an obvious incentive to purchase the goods abroad (typically from a third party who has legitimately purchased directly from the foreign producer) and resell them in the United States—perhaps without certain associated services or warranties—at a price below that charged by the American subsidiary. The same result can occur, however, if the American trademark owner is the parent and the goods are manufactured abroad by a foreign subsidiary.

The appellants are the Coalition to Preserve the Integrity of American Trademarks (COPIAT), a trade association of United States companies that own American trademarks, and two of its members, Cartier, Inc. and Charles of the Ritz Group Ltd. They urge that importation of goods bearing trademarks identical to their own is barred by two statutory provisions, Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1982), and Section 42 of the Lanham Trade-Mark Act of 1946, 15 U.S.C. § 1124 (1982). Customs regulations implementing these statutes permit the importation of such goods, *inter alia*, if the American and foreign trademarks are owned by the same or affiliated entities or if the American trademark owner has authorized the foreign entity to use the trademark. 19 C.F.R. § 133.21(c)(1)(3) (1985). The individual corporate appellants and, apparently, many of COPIAT's other members fall within these categories of trademark owners exempted from protection against imports.

The appellants brought suit below against the Commissioner of Customs, the Secretary of the Treasury, and the United States, seeking a declaration that the regulations are invalid because inconsistent with the two statutes and an injunction prohibiting their enforcement and compelling enforcement of the express terms of the statutes. Two

retailers who deal in grey-market goods, 47th Street Photo, Inc. and K-Mart Corporation, intervened as defendants. The district court initially determined that it had jurisdiction to adjudicate the claims presented, rejecting 47th Street Photo's argument that the United States Court of International Trade had exclusive jurisdiction over the action's subject matter. *Coalition to Preserve the Integrity of American Trademarks v. United States*, 598 F. Supp. 844, 847 (D.D.C. 1984). On cross-motions for summary judgment and a motion to dismiss, the district court then upheld the Customs regulations, holding that they were a "sufficiently reasonable" interpretation of the governing statutes, "supported by legislative history, judicial decisions, legislative acquiescence, and the long-standing consistent policy of the Customs Service." *Id.* at 852.

The issues raised in this case are matters of first impression in this Circuit, and, moreover, have engendered considerable disagreement among the courts considering them to date. The district court's holding on the issue of its jurisdiction conflicts with that of the Federal Circuit in *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986). Its views on the validity of the Customs regulations are in accord with those expressed in *Olympus Corp. v. United States*, No. CV-84-0920 (E.D.N.Y. Aug. 22, 1985), *appeal docketed*, No. 85-6282 (2d Cir. Sept. 27, 1985); *Vivitar Corp. v. United States*, 593 F. Supp. 420 (Ct. Int'l Trade 1984), *aff'd on other grounds*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986); and *Parfums Stern, Inc. v. Customs Serv.*, 575 F. Supp. 416 (S.D. Fla. 1983), but in conflict with those expressed in *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163 (S.D.N.Y. 1984) and *Bell & Howell: Mamiya & Co. v. Masel Supply Co.*, 548 F. Supp. 1063 (E.D.N.Y. 1982), *vacated on other grounds*, 719 F.2d 42 (2d Cir. 1983). For the reasons stated herein, we conclude that the district court correctly held that it

possessed jurisdiction over this action. We hold, however, that the district court erred in upholding the regulations, and that the appellants are entitled to a declaratory judgment that the regulations violate Section 526. Accordingly, we reverse the judgment of the district court.

I. JURISDICTION

At the outset, we are faced with a challenge to the jurisdiction of the district court and thus this court.[1] The issue is whether actions of this sort may properly be brought in federal district court or whether they must in all cases be initiated in the Court of International Trade, with appellate jurisdiction in the Federal Circuit. In a recent case, the Federal Circuit held that by virtue of a provision of the Customs Courts Act of 1980, 28 U.S.C. § 1581 (1982), the Court of International Trade has exclusive jurisdiction over claims based upon Section 526. *Vivitar Corp. v. United States,* 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986).

Absent that enactment there could be no doubt of the district court's power to adjudicate this action under the grant of general federal-question jurisdiction, 28 U.S.C. § 1331 (1982), and under the grant of jurisdiction for actions "arising under any Act of Congress relating to patents, . . . copyrights and trade-marks." 28 U.S.C. § 1338(a) (1982). Jurisdiction over the Section 42 claim is also conferred by the Lanham Act's jurisdictional provision, 15 U.S.C. § 1121 (1982). Because the Customs Courts Act did not create any new substantive law, but merely provided for exclusive jurisdiction over certain categories of cases in the Customs Court (the predecessor of the Court of International Trade), it follows that the Act divests the district courts of some of their preexisting

[1] 47th Street Photo is the only party who argues that this court lacks jurisdiction.

jurisdiction. *See Vivitar*, 761 F.2d at 1559-60. Specifically, it would seem that the district courts are without jurisdiction over any of the cases enumerated in 28 U.S.C. § 1581.[2]

The Federal Circuit in *Vivitar* held that two subsections of 28 U.S.C. § 1581 apply to an American trademark owner's challenge to the Customs regulations in question.

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[2] 28 U.S.C. § 1581 provides, *inter alia*:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> . . . .
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> > (1) revenue from imports or tonnage;
> >
> > (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> >
> > (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> >
> > (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

The parties appear to agree that the district court would have jurisdiction over the Lanham Act (Section 42) claim even if that claim fell within one of the categories listed in 28 U.S.C. § 1581. We fail to see why that would be so; if the Customs Courts Act implicitly modifies 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a) by vesting exclusive jurisdiction over specified cases in the Court of International Trade, then it ought to follow that it modifies the Lanham Act's jurisdictional provision, 15 U.S.C. § 1121, as well. We need not decide this issue, however, because we conclude that neither of the appellants' claims falls within the categories of cases listed in 28 U.S.C. § 1581.

First, it maintained that the Court of International Trade has exclusive jurisdiction over such actions "as a corollary to protest jurisdiction under 28 U.S.C. § 1581(a)." *Vivitar*, 761 F.2d at 1560. Under 28 U.S.C. § 1581(a), the Court of International Trade has exclusive jurisdiction over challenges to Customs' denial of "protests" filed under Section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515 (1982). Protests are administrative complaints available to importers challenging certain actions by Customs, including "the exclusion of merchandise from entry or delivery under any provision of the customs laws." 19 U.S.C. § 1514(a)(4) (1982). The case before the *Vivitar* court concerned an American trademark owner's challenge to Customs' decision *not* to exclude the merchandise in question, and there is no provision for administrative protests by such interested third-parties. Nevertheless, the Federal Circuit maintained that the case involved a *subject matter* that would have given rise to a protest (by the importer), if the goods had been excluded rather than admitted.[3] It then concluded that the case fell within 28 U.S.C. § 1581(i)(4), which creates jurisdiction over actions against federal agencies arising under laws of the United States providing for "administration and enforcement with respect to the matters referred to in . . . subsections (a)-(h) of this section." The court reasoned that a challenge to Customs regulations permitting importation of the goods at issue implicated "administration and enforcement" of the "matter"—*i.e.*, a protestable subject

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[3] The Government argues that a protest would not be available to an importer challenging an exclusion of goods under Section 526 because it is a trademark law, not a "customs law" and, therefore, the Court of International Trade and the Federal Circuit have no jurisdiction over cases arising under that Section. We believe, however, that *even if* 28 U.S.C. § 1581 covers the case of an importer's challenge to Customs' exclusion of goods under Section 526, it does not extend to a third-party's challenge to Customs' admission of goods. Thus, it is unnecessary for us to pass on this arcane point of Customs procedure.

matter—referred to in 28 U.S.C. § 1581(a); it viewed 28 U.S.C. § 1581(i)(4) as providing a "residual" basis for jurisdiction over cases not literally covered by 28 U.S.C. § 1581(a). *See Vivitar*, 761 F.2d at 1557-60.

We are of the opinion that the language of 28 U.S.C. § 1581(a) and (i)(4) will not bear the Federal Circuit's construction. We think, rather, that a sound reading indicates that the "matter[] referred to" in Section 1581(a) is the denial of protests, or simply protests. Because no right to protest arises from Customs' admission of goods—in contrast to its exclusion of goods—in such cases there is no administration and enforcement of this "matter" (protests). The Federal Circuit apparently felt that this straightforward construction of the statute would render Section 1581(i)(4) duplicative of Section 1581(a). *See Vivitar*, 761 F.2d at 1559. We disagree: whereas Section 1581(a) only provides for jurisdiction over cases contesting the denial of a protest—in other words, challenging the basis of the denial—Section 1581(i)(4) (as applied to Section 1581(a)) provides additional jurisdiction over cases challenging the *procedures*—that is, the "administration and enforcement"—generally governing such protests.

The Federal Circuit alternatively held that the Court of International Trade had jurisdiction under 28 U.S.C. § 1581(i)(3), which relates to actions against federal agencies arising under any law of the United States providing for "embargoes or other quantitative restrictions on the importation of merchandise . . . ." *See Vivitar*, 761 F.2d at 1559-60. Again, we must respectfully disagree with the Federal Circuit's view. Although Section 526 undoubtedly prevents certain goods from entering the country (those with trademarks identical to American trademarks), we think it is not an "embargo" contemplated by 28 U.S.C. § 1591(i)(3). The other categories of cases enumerated in

28 U.S.C. § 1581(i) all specifically deal with traditional Customs matters (and thus lie within the Court of International Trade's expertise): cases arising under laws providing for "revenue from imports or tonnage," 28 U.S.C. § 1581(i)(1), or for "tariffs, duties, fees, or other taxes on the importation of merchanidise . . . ," *id.* § 1581(i)(2). Thus, the structure of the statute belies any expansive reading of the term "embargo." Rather, it indicates that Section 1581(i)(3) only extends to quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like. Whereas subsection (i)(2) covers restrictive measures aimed at the *price* of imports (tariffs, duties, etc.), subsection (i)(3) covers restrictions on the *quantity* of imports.

In sum, we conclude that this action does not fall within any of the specific provisions of 28 U.S.C. § 1581. We find nothing in the purpose or legislative history of 28 U.S.C. § 1581 justifying a departure from its literal terms. Congress' overriding purpose was to consolidate jurisdiction over certain matters involving international trade in a single specialized court, bringing uniformity and expertise to the area. But those ends would not be served in this case. Regardless of which court takes jurisdiction over actions commenced against the Government, the district courts would still have jurisdiction over actions under Section 526(c) against private parties. 28 U.S.C. § 1581 being no bar, we hold that the district court properly exercised jurisdiction over this action under 28 U.S.C. § 1331, 28 U.S.C. § 1338(a), and 15 U.S.C. § 1121.

II. THE VALIDITY OF THE REGULATIONS

We turn, then, to the appellants' challenge to the Customs Service's failure to exclude all grey-market goods. The appellants claim that the Customs regulations

permitting the importation of such goods where the American and foreign trademarks are owned by the same or related entities, or where the American trademark owner has authorized the use of the trademark, *see* 19 C.F.R. § 133.21(c)(1)-(3) (1985), are contrary to the statutes they purport to implement, Section 526 of the Tariff Act of 1930 and Section 42 of the Lanham Trade-Mark Act of 1946. We conclude that the regulations simply cannot be squared with Section 526 and are thus invalid. In light of this holding, it is unnecessary to decide whether the regulations would be consistent with Section 42 standing alone.

Section 526(a) provides:

> Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, . . . and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, . . . unless written consent of the owner of such trademark is produced at the time of making entry.

19 U.S.C. § 1526(a) (1982).[4]

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[4] The remainder of Section 526 provides, *inter alia*:

> (b) Any such merchandise imported into the United States in violation of the provisions of this section shall be subject to seizure and forfeiture for violation of the customs laws.
>
> (c) Any person dealing in any such merchandise may be enjoined from dealing therein within the United States or may be required to export or destroy such merchandise or to remove or

Section 526 does not, on its face, admit of any exceptions based upon the relationship of the American and foreign trademark owners or upon whether the American owner has authorized the use of the trademark abroad. Nevertheless, the appellees maintain, and the district court held, that the Customs regulations must be upheld as a reasonable interpretation of the statute by the agency charged with its enforcement. We think, however, that the district court misapprehended the doctrine of deference to an agency interpretation of its governing statute. That doctrine only comes into play when it is apparent that "Congress has not directly addressed the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981). "If the intent of Congress is clear, that is the end of the matter . . . ." *Chevron*, 467 U.S. at 842.[5] Thus, courts must exercise

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> obliterate such trademark and shall be liable for the same damages and profits provided for wrongful use of a trade-mark [under the Lanham Act].
>
> (d)(1) The trademark provisions of this section and [Section 42 of the Lanham Act] do not apply to the importation of articles accompanying any person arriving in the United States when such articles are for his personal use and not for sale if (A) such articles are within the limits of types and quantities determined by the Secretary. . . .

19 U.S.C. § 1526 (b)-(d) (1982).

[5] In *Chevron*, the Supreme Court put to rest whatever uncertainty may have existed over the respective provinces of courts and administrative agencies in interpreting regulatory statutes:

> The judiciary is the final authority on issues of statutory construction and must reject administrative contructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory contruction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 n.9 (citations omitted).

their independent judgment on the preliminary question of whether a statute unambiguously expresses congressional intent on the matter at issue; deference to an agency's interpretation becomes appropriate where the statute delegates authority to an agency to give content to flexible statutory terms or contains "gaps" that invite an agency role in interpretation. *See id.* at 843-44; *Federal Election Comm'n*, 454 U.S. at 31-32; *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 385-86 (1969).[6]

In this case, we believe that Congress' intent in Section 562 is clear, and thus "that is the end of the matter." *See infra* Part II.A. Alternatively, we hold that the Customs regulations are invalid because they do not constitute a reasonable interpretation of Section 526. *See infra* p. 29.

A. *The Purpose of Section 526*

The broad protection afforded American trademark owners by Section 526 literally covers the appellants' situation. The appellees contend, however, that this court ought not be enticed by what they regard as the discredited "plain meaning" rule—that is, the traditional canon of statutory construction that precludes resort to extrinsic indicia of legislative intent if the language of a statute is unambiguous and fidelity to its literal terms will not produce an absurd result. It is not as clear as the appellees suggest that this canon of interpretation has been discredited. *See, e.g., Garcia v. United States*, 105 S. Ct. 479, 482-83 (1984); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 929-30 & n.11 (D.C. Cir. 1985).[7] In any event, this case

[6] "[P]roperly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation." *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 246 (1985) (citations omitted; emphasis in original).

[7] Of course, even under the "plain meaning" rule a court may consult legislative history and other sources if it is contended that applica-

does not compel us to choose between the "plain meaning" of a statute and extrinsic indicia of intent: our review of the circumstances prompting the enactment of Section 526 and its legislative history persuade us that the statute embodies a purpose as sweeping as the terms its drafters employed.

1. Background.—The broad scope of Section 526 can best be understood in light of the fundamental changes in thinking about trademark protection taking place during the period of its inception. The Second Circuit's decision in *A. Bourjois & Co. v. Katzel*, 275 F. 539 (2d Cir. 1921), a major stimulus for the enactment of Section 526, restated the prevailing law on the subject.[8] In that case, the plaintiff, an American company, had purchased the United States trademark rights of a French firm whose face powder it imported and distributed. The defendant, a retail druggist, purchased the French firm's face powder abroad and imported and sold it in competition with the American trademark owner. The Second Circuit reversed an injunction issued against such competition. The Court reasoned that trademarks, unlike patents, do not confer any monopoly upon their owner; they merely indicate "the origin of the goods they mark, so that the owner and the public may be protected against the sale of one man's goods as the goods of another man." *Id.* at 543. "If the goods sold are the genuine goods covered by the trademark, the rights of the owner of the trade-mark are not

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tion of the literal terms of a statute will lead to an absurd result. *See TVA v. Hill,* 437 U.S. 153, 184 n.29 (1978). Thus, in practice it may be that the rule will rarely preclude resort to extrinsic indicia of intent.

[8] *Katzel* was an infringement suit brought against a private party. It followed the reasoning of cases arising under Section 27 of the Trade-Mark Act of 1905 (the predecessor to Section 42 of the Lanham Act) that had rejected the claims of American trademark owners that Customs ought to exclude goods bearing genuine foreign trademarks identical to American trademarks. *See, e.g., Fred Gretsch Mfg. Co. v. Schoening,* 238 F. 780 (2d Cir. 1916).

infringed." *Id.* The dissenting judge observed in response: "It is not yet settled whether a trade-mark is to be primarily regarded as protecting the trade-mark owner's business from a species of unfair competition, or protecting the public from imitations. The decision in this case seems to me to lean the wrong way . . . ." *Id.*

Congress passed Section 526 as an amendment to the Tariff Act of 1922 (which was before it at the time) while review of the Second Circuit's *Katzel* decision was pending in the Supreme Court. The Supreme Court subsequently reversed the Second Circuit's decision without mentioning Section 526, which was not at issue in the case.[9] Writing for the Court, Justice Holmes emphasized that trademark law secures property rights as well as safeguarding the public from deception; he analogized the law's protection of trademarks to that afforded patented articles:

> If the goods were patented in the United States a dealer who lawfully bought similar goods abroad from one who had a right to make and sell them there could not sell them in the United States. The monopoly in that case is more extensive, but we see no sufficient reason for holding that the monopoly of a trade mark, so far as it goes, is less complete.

A. Bourjois & Co. v. Katzel, 260 U.S. 689, 692 (1923) (citations omitted).

Justice Holmes' opinion adopted what has come to be called the "territoriality" theory of trademark. This approach maintains that the source and scope of trademark protection arise from the law of a *particular* sovereign state, and thus that it is meaningless to discuss the

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[9] Section 526 provides for remedies against private parties as well, *see* 19 U.S.C. § 1526(c), but the statute was not available to the plaintiff in *Katzel* at the time it brought suit and presumably it was thought that the subsequent enactment could not affect the case on appeal.

"genuineness" of a trademark in the abstract. *See* Note, *The Greying of American Trademarks: The Genuine Goods Exclusion Act and the Incongruity of Customs Regulation 19 C.F.R. § 133.21*, 54 Fordham L. Rev. 83, 106-109 (1986). Justice Holmes wrote:

> It is said that the trade mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade mark of the plaintiff only in the United States and indicates in law . . . that the goods come from the plaintiff although not made by it.

260 U.S. at 692.[10]

2. Legislative History.—In enacting Section 526, Congress did not have the benefit of Justice Holmes' lucid, if characteristically terse, opinion in *Katzel*. Yet it is clear that Congress similarly rejected without qualification the legal theory underlying the Second Circuit's opinion in

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[10] Subsequently, in *A. Bourjois & Co. v. Aldridge*, 263 U.S. 675 (1923) (per curiam), a case with facts similar to those of *Katzel*, the Supreme Court held that goods bearing genuine foreign trademarks identical to American trademarks should be excluded from the country by the Customs Service under Section 27 of the Trade-Mark Act of 1905 (the predecessor to Section 42 of the Lanham Act), which barred the entry of goods that "copy or simulate" a registered trademark.

The appellees note that Holmes' opinion in *Katzel* (upon which *Aldridge* relied) emphasized that the plaintiff had expended considerable sums in advertising the French firm's powder, so that "the labels have come to be understood by the public here as meaning goods coming from the plaintiff." 260 U.S. at 691. Thus, it is argued, *Katzel* and *Aldridge* suggest that a plaintiff must demonstrate the existence of independent domestic goodwill before he may prevail on a claim that goods bearing an identical but genuine trademark infringe his trademark, and likewise before he may demand that such goods be excluded from importation under Section 42. Whether or not such a limitation on the scope of protection afforded by Section 42 is inferrable from *Katzel*—a matter we do not decide—it is plain that no such restrictions limit the reach of Section 526.

Katzel—the view that a trademark genuine in a foreign country is necessarily genuine here as well—and enshrined the alternative "territoriality" approach into law. Thus, the Conference Report accompanying the Tariff Act noted:

> A recent decision of the circuit court of appeals holds that existing law does not prevent the importation of merchandise bearing the same trade-mark as merchandise of the United States, if the imported merchandise is genuine and if there is no fraud upon the public. [Section 526] makes such importation unlawful without the consent of the owner of the American trade-mark . . . .

H.R. Rep. No. 1223, 67th Cong., 2d Sess. 158 (1922). The report's reference to *Katzel* mistakenly identifies it as an import exclusion case rather than an infringement case; more important, however, is the report's reflection of Congress' sweeping rejection of prevailing legal doctrine.

The appellees argue that statements made during the ten-minute Senate debate on Section 526 show that that body was primarily concerned with the specific factual scenario presented in *Katzel* (or its misperception of the facts of *Katzel*). The appellees would have us extrapolate from this that Congress did not intend Section 526 to bar importation of goods bearing an American trademark where the American trademark owner is not "independent" of the foreign trademark owner. Of course, isolated remarks made during a floor debate are less authoritative sources of congressional intent than are committee reports, *Garcia v. United States*, 105 S. Ct. 479, 483 (1984); *United States v. O'Brien*, 391 U.S. 367, 385 (1968), and in particular conference reports. *Cf. Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 929 n.10 (1985).

In any event, however, we think the Senate debate, considered as a whole, reinforces our conclusion that Section 526 confers an absolute, unqualified property right upon

American companies that own registered trademarks. Despite the briefness of the debate (the proponents apparently had the votes), opponents raised sharp and passionate objections to the broad property rights granted. For example, Senator Moses declared that Section 526 "constitutes but another diamond-studded link in the chain with which the Committee on Finance seems bound to adorn the buxom bosom of certain interests in this country." 62 Cong. Rec. 11,602 (1922). Conversely, Senator McCumber, a co-sponsor of Section 526, emphasized the need to reform existing trademark doctrine, which he criticized as "stating that the trade-mark is simply to indicate the character of the goods, or the maker, so that we will know what the goods are; and the courts will not protect the individual [trademark owner]." *Id.* at 11,605. Among the "individuals" that Congress appears specifically to have sought to protect were Americans who purchased the U.S. trademark rights of such well-known products as Bayer aspirin from the Government's Alien Property Custodian (who held the American assets of German companies seized during the First World War). *See id.* at 11,604 (remarks of Sen. McCumber); *id.* (remarks of Sen. Simmons).

Admittedly, Senator McCumber incorrectly described *Katzel* as a case where the firm that sold its American trademark rights to the plaintiff thereafter *itself* marketed identically-trademarked goods in the United States. *Id.* at 11,605. And Senator Sutherland declared: "[A]ll that [Section 526] does is to prevent fraud, and I believe that the Senate is in favor of protecting the property rights of American citizens who have purchased trade-marks from foreigners, and [sic] when these foreigners deliberately violate the property rights of those to whom they have sold these trade-marks by shipping over to this country goods under those identical trademarks." *Id.* at 11,603. In con-

text, however, such statements are best understood as efforts by proponents of a bill to understate its significance by focusing on its most notorious targets. Shortly after Senator Sutherland's assertion that the measure would only "prevent fraud," an opponent, Senator Lenroot, raised a number of questions about the scope of Section 526. He first suggested a hypothetical case of an American citizen purchasing a sack of American-made Wonder flour in Toronto and then seeking to return home with it. *Id.* at 11,603. As he read the provision, crossing the border with the sack of Wonder flour would be illegal. Senator Sutherland answered, "And it ought to be," *id.* at 11,603, which clearly suggests that his previous statement concerning "fraud" must be taken with a grain of salt.

In any event, others apparently thought this result too harsh on the hypothetical purchaser of Wonder flour. Senator McCumber suggested, and the body agreed, that the proposed version of Section 526 be amended to its present form to cover only goods "of foreign manufacture." *Id.* at 11,603-04. Importantly, he did *not* answer Senator Lenroot's hypothetical case by simply noting (as the Customs Service would under its regulations) that the owners of the American and Canadian trademarks were the same company, or that the American trademark owner had authorized the use of the trademark.

Later in the debate, a scenario quite like the facts of the instant case was discussed. Senator McCumber was asked whether Section 526 would preclude competition with an American firm that acquired an exclusive distributorship of a foreign trademarked article, Pears' soap. *Id.* at 11,605. Senator McCumber responded that Section 526 would not have that effect because only registered trademarks owned by American domiciliaries were protected by it. *Id.* In fact, Senator McCumber was mistaken; the original version of Section 526 required that the trademark be registered by an American domiciliary, but

did not require that it be *owned* by an American citizen or corporation. The House subsequently discovered this omission, and the conferees amended Section 526 to add such a requirement. H.R. Rep. No. 1223, 67th Cong., 2d Sess. 158 (1922).

Senator McCumber's response, however, did not satisfy Senator Lenroot, who was concerned that foreign corporations could obtain the statutory monopoly simply by incorporating an American subsidiary. In the debate's final colloquy, Senator Lenroot pressed Senator McCumber on this point. To be sure, Senator McCumber's answer, whether designedly or not, was not a model of clarity:

> SEN. LENROOT: We will assume that Pears' soap . . . is not registered in the United States. It is sold in the general markets throughout the world, but the makers of Pears' soap desire a monopoly in the United States. They have American agents who register a trade-mark of Pears' soap here in the United States. I want to inquire whether any American could purchase Pears' soap abroad and import it without the written consent of their agent here in the United States and if not, why not? . . . .
>
> SEN. MCCUMBER: [I]f there has been no transfer of trade-mark, that presents an entirely different question. But suppose the trade-mark is owned exclusively by an American firm or corporation. The mere fact of a foreigner having a trade-mark and registering that trade-mark in the United States, and selling the goods in the United States through an agency, of course, would not be affected by this provision.
>
> SEN. LENROOT: This is an international trade-mark of Pears' soap, registered here by an American, with American domicile. Under it Pears' soap could not

> be bought in the markets of the world and sold here without the written consent of the Pears' soap company, or their agent domiciled here in America.

62 Cong. Rec. 11,605 (1922). At this point, time ran out on the debate, and so despite his doggedness Senator Lenroot never got an acceptable answer to his question.

Thus, the debate does not unequivocally resolve all questions about the scope of Section 526. Nevertheless, we think that the appropriate inference to be drawn is that Senator Lenroot was correct in fearing that the statute meant exactly what it said. We recognize that just as a proponent of a bill may tend to downplay its significance, an opponent may be prone to exaggerate its repercussions. But no Senator suggested that Senator Lenroot's reading of the statute was unwarranted. To the contrary, two amendments to Section 526 were made to respond to specific hypothetical cases that he raised: first, the Senate added the limitation that only foreign-made goods were covered; second, the House added the requirement that only American companies were entitled to the protections of the statute. Senator Lenroot explicitly raised the issue of an American subsidiary of a foreign company, but the conferees did not further amend the statute. The reasonable inference to be drawn from all this is that the lawmakers consciously drew the line at American companies, and did not adopt distinctions among different categories of American companies.[11]

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[11] The appellants points out that in other statutes Congress has not only required that corporations be created in the United States but has required that certain percentages of voting stock be owned by Americans or that a certain percentage of the seats on the board of directors be held by Americans. *See, e.g.*, provisions of the Federal Aviation Act of 1958, 49 U.S.C. § 1301(16) (1982); Communications Act of 1934, 47 U.S.C. §310(b)(3)-(4) (1982).

3. The 1930 Reenactment. —In 1930, the statute was repealed and reenacted in identical form, becoming Section 526 of the Tariff Act of 1930. The reenactment followed an unsuccessful effort to amend the statute by deleting the clause permitting an American trademark owner to consent to the admission of goods bearing its trademark into the country. That effort was designed to protect American jobs by preventing U.S. manufacturers from establishing foreign-based plants. *See* S. Rep. No. 37, 71st Cong., 1st Sess. 75 (1929) ("[W]here the laws of the United States protect the interest of a trade-mark holder by allowing him a monopoly in the use of the mark, it is reasonable to require, so far as practicable, that, in return, the holder of the trade-mark shall manufacture his goods in the United States."). Although this amendment did pass the Senate, it was rejected by the House and abandoned in conference. 72 Cong. Rec. 7870 (1930).. This failed amendment further demonstrates Congress' understanding that Section 526 absolutely barred importation of goods bearing an American company's trademark without the company's consent. If, as the Customs Service now contends, the Act does not bar the importation of goods bearing a genuine trademark identical to an American trademark where the American and foreign trademark owners are the same company, or where the American trademark owner has authorized the use of the trademark, then the 1929 Senate passed an amendment that would have been wholly ineffectual and purposeless.[12]

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[12] Thus, the appellees can obtain no solace from the statement of Senator Reed during the floor debate on the 1930 reenactment:

> At the present time the tariff laws forbid the importation of an article bearing a trade-mark registered in America unless the owner of that trade-mark consents in writing to that importation.

Of course, because the statute was reenacted in identical form, the legislative history of the original enactment is of primary significance. Nevertheless, the events of 1929-30 reinforce our interpretation of the original legislative purpose. Although the attempt to amend the terms of Section 526 failed, no Member of Congress suggested that the amendment should be rejected because it could not achieve its intended purpose. Thus, it would seem that the entire body in 1930—those favoring and those opposing the amendment—believed that Section 526 applied to all situations literally within its terms.

4. Contemporaneous Interpretations.—The courts' reception of Section 526 supports our conclusion that it contains no implied exceptions. *Sturges v. Clark D. Pease, Inc.*, 48 F.2d 1035 (2d Cir. 1931), held that Section 526 barred an individual's importation of a trademarked automobile for his personal use. The Second Circuit, referring to the Act as "drastic," rejected an argument that it only applied in situations similar to the facts of *Katzel*. Although Section 526 was enacted in response to *Katzel*, Judge Augustus N. Hand observed, "this fact does not settle the scope of the act." *Id.* at 1037.

For its part, the Customs Service gave no hint in its initial interpretations that it discerned implied limitations on the scope of Section 526. Its first set of regulations in 1923 simply referred to the Act without attempting to interpret it. Customs Regulations of 1923, Art. 476. The Customs

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> Obviously the purpose of that provision is to protect the American owner of the trade-mark against importations of articles which have been stamped with his mark without his consent.

71 Cong. Rec. 3873 (1929). Because Senator Reed was a *proponent* of the effort to strip American trademark owners of the privilege of consenting to imports, logically the phrase "without his consent" in his remarks modifies "importations" rather than "stamped with his mark."

Service's second set of regulations, promulgated after the 1930 reenactment of Section 526, merely stated: "Entry is prohibited of imported merchandise bearing a genuine trade-mark [identical to a properly recorded and registered American trademark] if compliance is had with all provisions of section 526 of the tariff act of 1930 . . . ." Customs Regulations of 1931, Art. 518(a).

In light of the language of the statute, its legislative history and purpose, and the contemporaneous constructions placed upon it, we conclude that Section 526 simply cannot be limited in the manner that the Customs Service has attempted. *See Vivitar*, 761 F.2d at 1561-65. Because Congress' intent on the issue at hand is apparent, we must give effect to that intent irrespective of current administrative interpretations. *Chevron*, 467 U.S. at 842-43 & n.9. In Section 526, Congress defined the relevant statutory terms with precision and did not delegate authority, explicitly or implicitly, to the Customs Service to adjust the scope of the statute in response to its perceptions of changing economic circumstances. What the statute meant in 1922 and in 1930 is what it means today.

B. *Subsequent Legislative and Administrative History*

The appellees maintain that the Customs regulations are supported by developments in the half-century since the passage of Section 526. First, they contend that the regulations embody a reasonable, longstanding administrative interpretation of the statute; second, they suggest that Congress has manifested its "acquiescence" in that interpretation. We have already explained that the first argument must fail because deference to an agency's construction is inappropriate when congressional intent is clear; alternatively, we conclude that even if the Customs Service properly enjoys some role in construing the scope of Section 526, the regulations at issue do not in fact constitute a "sufficiently reasonable" interpretation of the statute.

Federal Election Comm'n, 454 U.S. at 39. *See infra* p. 29. We also reject the appellees' argument that Congress has somehow ratified the Customs Service's interpretation through its silence. *See infra* pp. 29-31.

1. *Developments in the 1930s and 1940s.* – Neither the 1923 nor the 1931 regulations had recognized any exceptions to the broad mandate of Section 526. Each contained separate articles enforcing the prohibition of Section 27 of the Trade-Mark Act of 1905 (the predecessor to Section 42 of the Lanham Act) against the entry of goods bearing trademarks that "copy or simulate" registered trademarks. *See* Customs Regulations of 1923, Art. 475; Customs Regulations of 1931, Art. 517(b). In 1936, however, the Customs Service unveiled a new approach. Article 518 of the 1931 regulations, which had dealt solely with Section 526, was now amended to correspond to the language of Section 27. The new Article 518 provided, *inter alia*, that foreign goods bearing a genuine trademark identical to an American trademark "shall be deemed for the purposes of these regulations to copy or simulate such protected trademark," T.D. 48,537 (1936);[13] however, it then exempted from this prohibition articles bearing foreign trademarks owned "by the same person, partnership, association, or corporation" as the American trademark in question. *Id.* The Customs Service regulations offered no explanation for this change, and it is doubtful that amended Article 518 even purported to interpret Section 526 as well as Section 27.[14]

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[13] Amended Article 518 also contained a marginal reference to *A. Bourjois & Co. v. Aldridge,* 263 U.S. 675 (1923), which, it will be recalled, had held that Section 7 barred grey-market imports under circumstances similar to those present in *Katzel. See supra* note 10.

[14] However, although Article 518 of the 1936 regulations did not expressly rely upon Section 526 as statutory authority, the Customs Service's 1943 recodification of its regulations did add a marginal citation to Section 526. *See* 19 C.F.R. § 11.14(b) (1943).

Certainly the United States Tariff Commission (now the International Trade Commission), another agency dealing with trade matters, did not think so. In 1944, when Congress held hearings on legislation that eventually became the Lanham Trade-Mark Act of 1946, it considered a memorandum submitted by that agency suggesting that Article 518 of the 1936 regulations, in view of its "copy or simulate" language, implemented Section 27 *but not* Section 526. Hearings Before a Subcomm. of the Comm. on Patents on H.R. 82, United States Senate, 78th Cong., 2d Sess. 86-87 (1944). The Commission justified this interpretation of Section 27 on the grounds that an enterprise could not "copy or simulate" its own trademark. *Id.* at 87. On the other hand, the Commission maintained, "Section 526 of the tariff act *does* apply to the merchandise of the trade-mark owner which bears his trade-mark if the merchandise was produced abroad and if the trade-mark owner is a citizen of the United States." *Id.* (emphasis added). After having been informed of the relationship between the two statutes and the prevailing administrative practice, Congress left Section 526 untouched and reconstituted Section 27 in identical form as Section 42 of the Lanham Act.

2. *Developments in the 1950s.*—Events of the 1950s reveal the Customs Service's profound confusion about the scope of Section 526 and its relationship to Section 42. On the one hand, in a 1951 private letter, the Commissioner of Customs set forth the agency's view that Section 526 did not bar importation of the trademarked article of a foreign subsidiary of an American trademark owner. Letter from Frank Dow, Commissioner of Customs, to Sen. Paul H. Douglas, March 23, 1951 (Joint Appendix (J.A.) at 350). In 1953, Customs had the opportunity to codify this view when it amended the applicable regulation (now renumbered as Section 11.14) to provide that a genuine foreign trademark will not be deemed to copy or

simulate an identical American trademark if both are owned by the same company *or* related companies. 19 C.F.R. § 11.14 (1953). But the amended regulation actually *deleted* a reference to Section 526 as statutory authority. And, to confound matters further, in 1958 the Solicitor General of the United States informed the Supreme Court that the Customs Service regarded Section 526 as a bar to importation of grey-market goods even in the related-company context. The Government had brought an antitrust action against American affiliates of foreign enterprises who had used Section 526 to preclude competition from grey-market imports. A district court had held Section 526 did not protect such American affiliates and had found them guilty of antitrust violations. *United States v. Guerlain, Inc.,* 155 F. Supp. 77 (S.D.N.Y. 1957). On direct appeal to the Supreme Court, the Solicitor General informed the Court that the United States wished to abandon the suit, noting the existence of intragovernmental conflict over the interpretation of Section 526 and suggesting that new legislation would be introduced to settle the controversy. Appellee's Motion to Vacate at 7, *Guerlain, Inc. v. United States,* 358 U.S. 915 (1958). According to the Solicitor General, the Justice Department's Antitrust Division considered Section 526 unavailable to American subsidiaries of foreign trademark owners, while Customs regarded itself as "legally constrained" to enforce Section 526 literally. *Id.* The Supreme Court accordingly vacated the lower court's judgment. *Guerlain,* 358 U.S. at 915.

During the 1950s, Congress also reconsidered Section 526. In 1954, a bill was introduced in Congress that would have made the protections of Section 526 unavailable to an American trademark owner affiliated with the owner of an identical foreign trademark—in other words, a bill that closely parallels the Customs regulations at issue here. H.R. 9476, 83d Cong., 2d Sess. (1954). That bill, however,

was defeated. In 1959, after the Supreme Court vacated the *Guerlain* judgment at the Solicitor General's request, another bill was introduced that would have repealed Section 526 altogether. H.R. 7234, 86th Cong., 1st Sess. (1959). But Congress rejected that proposal too.

In the aftermath of the *Guerlain* imbroglio, the Customs Service amended its regulations to delete the "related company" exception (while retaining the "same company" exception) and to add a citation to Section 526 as statutory authority for the regulations. *See* 19 C.F.R. § 11.14 (1959). There is some evidence, however, that the Customs Service privately continued to regard related companies as outside the scope of Section 526's protection. *See* Letter From D.H. Flynn, Deputy Commissioner of Customs, to Walter A. Slowinski, Esq., June 27, 1962 (J.A. at 355); Atwood, *Import Restrictions on Trademarked Merchandise—The Role of the United States Bureau of Customs*, 59 Trade-Mark Rep. 301, 310 (1969).

3. Developments in the 1970s.—The regulations were adopted in their current form in 1972. These regulations, we have noted, deny the protections of Section 526 to an American trademark owner when that company or an affiliate owns the foreign trademark or when it has authorized the use of the trademark. 19 C.F.R. § 133.21 (c)(1)-(3). At no risk of overstatement, however, we observe that the Customs Service has not carefully explained exactly what purpose the regulations serve. The Federal Register notice accompanying the 1972 regulations, 37 Fed. Reg. 20,677 (1972), offers no insight into the agency's reasoning. From the scattered evidence the parties have cited to us, it appears that the regulations might be regarded as resting in part on a reading of the legislative history of Section 526, *see* Letter from Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division, to Miles J. Ambrose, Commissioner of Customs,

April 19, 1971 (J.A. at 343), and in part on an accommodation of Section 526 with the policy of the antitrust laws. *See id.; see also* Letter from Treasury Secretary Donald T. Regan to Senator Dennis DeConcini, December 23, 1983 (J.A. at 319) (stating that the regulations are based on the *Guerlain* case). But prevailing antitrust doctrine has changed significantly since the *Guerlain* era. Perhaps because it is now recognized that domestic vertical restraints such as territorial market divisions may in fact have procompetitive effects, *see, e.g., Continental T.V., Inc. v. G.T.E. Sylvania, Inc.,* 433 U.S. 36 (1977), the Government apparently no longer emphasizes the antitrust aspects of its interpretation of Section 526.[15] In fact, in a recent case the Justice Department—joined, significantly, by the Customs Service—filed an amicus brief arguing that Section 526 raised no antitrust concerns and *ought to be enforced according to its expressed terms.* See Brief of United States as Amicus Curiae, *Bell & Howell: Mamiya Co. v. Masel Supply Co.,* 719 F.2d 42 (2d Cir. 1983). That amicus brief, seemingly flatly at odds with the Customs regulations under challenge here, represents yet another curious turn in the sixty years of Customs' administration of Section 526.

In 1978, a congressional committee report reviewing the statute took notice of Customs' interpretation. In the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888, Congress created an exception from the broad ban of Section 526 for goods brought into the country by individuals for their personal

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[15] We wish particularly to emphasize, however, that we express no view as to how antitrust analysis bearing on domestic vertical arrangements applies to the extraterritorial arrangements present in this case.

use, 19 U.S.C. § 1526(d) (1982); thus, after almost fifty years, Congress reversed the rule of *Sturges v. Clark D. Pease, Inc.*, 48 F.2d 1035 (2d Cir. 1931), *discussed supra* at p. 22. The House report accompanying this legislation stated:

> [Section 526] has been consistently interpreted by the United States Customs Service for the past 20 years as excluding from protection foreign-produced merchandise bearing a genuine trademark created, owned and registered by a citizen of the United States if the foreign producer has been authorized by the American trademark owners to produce and sell abroad goods bearing the recorded trademark.

H.R. Rep. No. 621, 95th Cong., 1st Sess. 27 (1977). Neither the Senate report, *see* S. Rep. No. 778, 95th Cong., 2d Sess. 33 (1978), nor the conference report, *see* H.R. Rep. No. 1517, 95th Cong., 2d Sess. 16 (1978), contained any similar reference to administrative practice.

* * *

From this review, we find that the Customs Service's interpretation of Section 526 does not display the necessary "thoroughness, validity, and consistency" to merit judicial acceptance. *Federal Election Comm'n*, 454 U.S. at 37. The Customs Service's interpretation under review here was not adopted contemporaneously with the statute, *see Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); moreover, the first set of Customs regulations announcing this policy appeared to implement *another* statute, then-Section 27 of the Trade-Mark Act of 1905, rather than Section 526. Nor has the Customs Service's interpretation since that time been supported by anything more than poorly articulated and vacillating reasoning. As our analysis shows, *see supra* Part II.A.2., the legislative history of Section 526 provides little if any support for its interpretation. At least since the 1950s, Customs' inter-

pretation has been driven in large part by a perceived need to obviate the antitrust problems raised by a multinational corporation's use of an American subsidiary to preclude competition in the distribution of its trademarked product. But even if the Customs Service possessed the authority to infuse antitrust concerns into Section 526—a dubious proposition at best, *see Osawa & Co. v. B & H Photo,* 589 F. Supp. 1163, 1177-78 (S.D.N.Y. 1984)—the Service (together with the Justice Department) has not been remotely consistent in its exercise of that authority. We conclude that the Customs regulations cannot be upheld as a reasonable construction by the Customs Service of a statute it is charged with enforcing. *See Vivitar*, 761 F.2d at 1565-68.

We also reject the district court's view that this history reveals "a pattern of legislative acquiescence . . . indicat[ing] acceptance by the Congress of the Customs Service's interpretation of section 526 . . . ." *Coalition to Preserve the Integrity of American Trademarks v. United States,* 598 F. Supp. 844, 851 (D.D.C. 1984). In reaching this conclusion, we think that the district court departed from sound principles of statutory construction. To begin with, "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969) (citations omitted). Indeed, the unsuccessful efforts in 1954 and 1959 to repeal or modify Section 526, if anything, would suggest that Congress *rejected* a narrow view of its scope. Nor can approval of the Customs Service's interpretation of Section 526 be inferred more generally from Congress' failure to correct that interpretation. Since the Framers of our Constitution deliberately made the passage of legislation difficult—more difficult, for instance, than in parliamentary democracies—Congress simply cannot be obliged affirmatively to correct subsequent administrative interpreta-

tions inconsistent with original legislative intent; that is the responsibility of the courts. *See Vivitar*, 761 F.2d at 1568 ("Legislation by total silence is too tenuous a theory to merit extended discussion.").

The circumstances surrounding the 1978 amendment also fail to support a case of congressional "ratification" of the Customs Service's interpretation of Section 526. In 1978, Congress simply added an amendment to the statute; thus, the proposition that Congress may be presumed to have adopted well-known administrative interpretations of a statute when it reenacts that statute without change, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982), is inapplicable to this case. Congress reconsidered and addressed only the narrow issue of tourists returning to the country with trademarked goods intended for their personal use. That Congress deemed it necessary to amend the statute to exempt such cases from the statutory ban, in fact, suggests that it rejected the existence of implied limitations on the scope of Section 526. One casual statement in a committee report of one chamber, moreover, simply does not demonstrate Congress' "prolonged and acute awareness" of the Customs Service's interpretation, much less its "approval" and adoption of that interpretation. *See Bob Jones University v. United States,* 461 U.S. 574, 601 (1983).

The intervenors argue with great vigor that Section 526, as we interpret it, would deprive American consumers of the benefit of imports at prices lower than those maintained by foreign producers through exclusive distribution by their American subsidiaries. That may well be so. They further contend that other nations, particularly our trading partners and competitors, do not permit American producers to maintain prices in their countries in this fashion, and that Section 526 in today's international market constitutes a sort of economic unilateral disarma-

ment. That may also be so. Moreover, it is certainly true that economic and trading conditions have changed a good deal since 1922, and it may now be possible for foreign producers with an exclusive distributorship in the United States to maintain artificially high prices on desirable imports in a manner quite unforeseen sixty years ago. All of these arguments are properly addressed to Congress; it is not open to the Customs Service, still less the Judiciary, to modify the law to take into account these considerations.

C. *Enforcement Discretion*

Although it agreed that the Customs regulations do not represent a reasonable interpretation of Section 526, the Federal Circuit in *Vivitar* concluded that the Customs regulations can be upheld "as a reasonable exercise of administratively initiated enforcement." 761 F.2d at 1571. In its view, the Customs Service's policy of admitting certain categories of grey-market goods could be analogized to an agency's traditional prerogative of deciding when and how to enforce the statute it administers. We must reject this conclusion, however, for what seems to us a compelling reason: the Customs Service has never purported to justify these regulations as an exercise of enforcement discretion. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). From the start, the Customs Service has regarded the regulations as its interpretation of what the law requires rather than as a decision not to prosecute to the letter of the law. *Cf. United Auto. Aerospace & Agr. Implement Workers v. Brock*, 783 F.2d 237, 245-46 & n.15 (D.C. Cir. 1986) (contrasting interpretation of law from exercise of enforcement discretion). Indeed, the Customs Service has historically enforced what it regards to be the law so relentlessly that it required an amendment to the statute to permit tourists to bring items intended for personal use back into the country with them. *See* 19 U.S.C. § 1526(d) (1982). Thus, this case simply does not raise the question

of whether the Customs Service could refrain from excluding certain grey-market goods as an exercise of enforcement discretion.[16]

III. Remedy

We turn to the remedy. The appellants have requested that the Customs Service be enjoined from enforcing the present regulations and ordered, in effect, to enforce the statute to its fullest. We think, however, that injunctive relief is inappropriate at this juncture of the controversy. The appellants have levelled a facial challenge to the validity of the regulations; the relief they seek is not an order compelling the Customs Service to exclude specific goods, but rather a broad decree that would entail continuing supervision by the courts. We must decline the invitation. Although the appellants are entitled to declaratory relief—"an alternative to the strong medicine of the injunction," *Steffel v. Thompson*, 415 U.S. 452, 466 (1974)—their request for injunctive relief should be denied.

For the foregoing reasons, the judgment of the district court is *reversed* and the case is *remanded* to the district court with instructions to issue a declaratory judgment that the Customs regulations in question, 19 C.F.R. § 133.21(c)(1)-(3), are contrary to Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526, and hence unlawful.

So ordered.

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[16] Thus, we are not obliged to decide whether Customs' adoption of a general policy of admitting certain categories of grey-market goods that are concededly barred by Section 526 would amount to "an abdication of its statutory responsibilities." *Heckler v. Chaney*, 105 S. Ct. 1649, 1656 n.4 (1985) (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5890

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

Filed Aug. 6, 1986

ORDER

Before MIKVA, BORK, and SILBERMAN, Circuit Judges.

Upon consideration of the motions for stay of issuance of the mandate, it is

ORDERED, by the Court, that the motions are granted, and the Clerk is directed to withhold issuance of this Court's mandate through September 30, 1986.

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 84-0390

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS,

AND

47TH STREET PHOTO K-MART CORPORATION, INTERVENOR-DEFENDANTS.

Dec. 5, 1984

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Plaintiffs bring this action for declaratory and injunctive relief, in part in the nature of mandamus, alleging that certain regulations of the Customs Service, an agency of the Department of the Treasury, are inconsistent with the Tariff Act of 1930 and the Lanham Trademark Act of 1946. Asserting that these regulations deny them their entitlement to the full protection of their trademarks as mandated by these statutes, plaintiffs seek a declaration that the regulations are inconsistent with the statutes, an injunction prohibiting enforcement of these regulations, and an order directing that the statutes be enforced in accordance with their express terms.

BACKGROUND

Plaintiffs, American companies suing individually or by representation through their membership in the Coalition to Preserve the Integrity of American Trademarks (COPIAT), are manufacturers or distributors of such trademarked products as fragrances and cosmetics, watches, tires, fine crystal, cameras, photographic equipment, binoculars, and electronic goods. As owners of trademarks registered with the United States Patent and Trademark Office, plaintiffs have also filed copies of the certificates of registration with the Customs Service pursuant to section 42 of the Lanham Act. They claim to suffer damage from the importation and sale in this country of products known as diverted, graymarket, or parallel goods manufactured by their foreign subsidiaries or licensees and bearing their trademarks but imported without authorization. Seeking a mandatory order directing the Customs Service to exclude such goods from entry into this country, plaintiffs contend that the Tariff Act of 1930 and the Lanham Trademark Act of 1946 give them an unqualified right to demand such exclusion. Although plaintiffs license certain foreign subsidiaries to manufacture goods bearing their trademarks, they assert that unrelated third parties import these products without their consent.

Defendants are the United States of America, Donald T. Regan, Secretary of the Treasury, and William Von Raab, Commissioner of the United States Customs Service. Intervenor-defendant 47th Street Photo is a retailer of camera, video, and other electronic equipment in New York City. Intervenor-defendant K-Mart Corporation (K-Mart) is a mass merchandiser and retailer operating more than 2,000 discount department stores. Both 47th Street Photo and K-Mart are engaged in the sale of diverted goods to consumers in this country. Progress Trading Company, Inc., and The American Free Trade

Association, which import and distribute diverted goods, as well as four American consumers, were granted leave to file briefs as amici curiae and support the position of K-Mart.

This matter is presently before the Court on the motion of intervenor-defendant 47th Photo to dismiss, plaintiffs' motion for summary judgment, the cross motion of federal defendants for summary judgment, and the cross motion of intervenor-defendant K-Mart for summary judgment. For the reasons set forth below, the motion of 47th Street Photo to dismiss will be granted in part and denied in part; the motion of plaintiffs for summary judgment will be denied; and, the cross motions of federal defendants and K-Mart for summary judgment will be granted.

MOTION TO DISMISS

The Court first turns its attention to the threshold issue of jurisdiction and considers the motion of intervenor-defendant 47th Street Photo to dismiss for lack of subject matter jurisdiction. 47th Street Photo contends that the Court of International Trade has exclusive jurisdiction over plaintiffs' claims under section 526 of the Tariff Act and that plaintiffs' averments with respect to section 42 of the Lanham Act fail to state a claim upon which relief may be granted. In support of the motion to dismiss under the Tariff Act, 47th Street Photo relies on a virtually identical action recently decided in the United States Court of International Trade wherein that court rendered a decision on the very jurisdictional issue presented by this case. In *Vivitar Corp. v. United States, et al.*, 585 F.Supp. 1415 (CIT 1984), the Court of International Trade held that it possesses exclusive jurisdiction over claims arising under section 526 of the Tariff Act. The court premised its jurisdiction on its exclusive jurisdiction under 28 U.S.C. § 1581(a) over international trade disputes and rejected

the argument that jurisdiction properly lies in the District Courts because the action is based primarily on United States trademark laws. In addition, 47th Street Photo argues that for prudential reasons the Court of International Trade should exercise jurisdiction over this complex issue in order to avoid duplication of judicial and legal resources and possible conflicting decisions. In opposition to the motion to dismiss the claim under the Tariff Act, plaintiffs contend that this court has jurisdiction over all aspects of the case.

The Court rejects intervenor-defendant's contentions and finds that jurisdiction is present in this case by virtue of the general federal question jurisdiction under 28 U.S.C. § 1331, the specific jurisdiction under 28 U.S.C. § 1338(a) of actions arising under statutes relating to trademarks, and the specific jurisdiction under 15 U.S.C. § 1121 of all actions arising under the Lanham Trademark Act. This case, contrary to the argument of 47th Street Photo, is not within the purview of any of the specific provisions of 28 U.S.C. § 1581 which would vest the United States Court of International Trade with exclusive jurisdiction. Therefore, the motion of 47th Street Photo to dismiss for lack of subject matter jurisdiction must be denied.

47th Street Photo also contends that the amended complaint fails to state a claim under section 42 of the Lanham Act, 15 U.S.C. § 1124, in that the goods in question bear a genuine trademark rather than one that copies or simulates a registered trademark. Section 42 of the Lanham Act provides that "no article of imported merchandise . . . which shall copy or simulate a trademark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States . . . ." Plaintiffs argue that despite the statute's plain language, the Supreme Court's decisions in *A. Bourjois & Co. v. Katzel*, 275 F. 539 (2d Cir. 1921),

reversed 260 U.S. 689 (1923), and *A. Bourjois & Co. v. Aldridge*, 292 F. 1013 (2d Cir.1922), 263 U.S. 675 (1923), construed section 27 as barring the parallel importation of genuine trademarked goods. However, the Court finds that *Katzel* and *Aldridge* are distinguishable from the instant case. In *Katzel*, the Supreme Court held that an American purchaser of domestic trademark rights was totally independent from the foreign manufacturer and became the complete master of the trademark in the United States for the reason that the public recognized the American purchaser as the sole source of goods in the United States. It was further held that the foreign manufacturer, who had sold its business and trademark in this country, could not subsequently import its products to this country using the old trademark in competition with the American purchaser of the trademark. The *Katzel* holding was premised largely on the equities of the case and was intended to overcome the unfairness of permitting the foreign manufacturer, having sold its trademark rights to another, to thereafter arrange to have its goods marketed in the United States by someone other than the independent American purchaser.

Shortly thereafter, in *Aldridge*, with facts identical to those in *Katzel*, the Supreme Court ruled *per curiam* that the same plaintiff as in *Katzel* could prevent the importation by a third party of face powders made in France by the same company from which the plaintiff obtained its powder. Thus, the *Aldridge* decision, which was tied completely to the facts and analysis of *Katzel*, held only that infringing goods within the equitable reasoning of *Katzel* could be excluded. Under *Katzel* and *Aldridge*, a trademark on imported merchandise would be deemed to "copy or simulate" if the United States registrant who had purchased the rights was truly independent of the foreign entity applying the mark abroad and had developed its own goodwill in the American marketplace.

The Court finds, based on the foregoing, that absent the *Katzel* situation, section 42 of the Lanham Act clearly applies only to merchandise bearing counterfeit or spurious trademarks that "copy or simulate" genuine trademarks. Therefore, plaintiffs' amended complaint fails to state a claim upon which relief may be granted under section 42. Accordingly, the claim under the Lanham Act must be dismissed.

MOTIONS FOR SUMMARY JUDGMENT

Having determined that there is subject matter jurisdiction over plaintiff's claims under the Tariff Act, the Court will now address the cross motions for summary judgment. Summary judgment is an extraordinary remedy and should be granted only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits conclusively demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court finds that there are no genuine issues of material fact in dispute and this case is appropriate for summary disposition.

The primary issue for determination is whether the challenged Customs Service regulations are inconsistent with the Tariff Act and should be set aside. Section 526(a) of the Tariff Act of 1930, 19 U.S.C. § 1526, provides that in the absence of the written consent of a trademark owner, it is unlawful to import into the United States "merchandise of foreign manufacture" that bears a trademark "owned by a citizen of, or by a corporation or association created or organized within the United States" properly registered in the Patent and Trademark Office and a copy of the certificate of registration filed with the Secretary of the Treasury in the manner provided by section 42 of the Lanham Act. Merchandise imported in violation of section 526 is subject to seizure and forfeiture.

The challenged regulations, adopted in 1972 and codified in 19 C.F.R. § 133.21(c)(1)-(3), were promulgated to implement 19 U.S.C. § 1526. Fed.Reg. 20677, *et seq.* The Customs Service regulations provide that restrictions relating to trademark imports do not apply to imported articles when:

(1) both the foreign and the U.S. trademark are owned by the same person or business entity;
(2) the foreign and domestic trademark owners are parent and subsidiary companies or are otherwise subject to common ownership or control; and
(3) the articles of foreign manufacture bear a recorded trademark applied under authorization of the U.S. owner.

I.

The provisions of 19 U.S.C. § 1526 were first enacted into law as part of section 526 of the Tariff Act of 1922 and were re-enacted without change as part of the Tariff Act of 1930. In 1936, the Customs Regulations of 1931 promulgated pursuant to the Act, were amended to read as follows:

> Art. 518. Prohibition of importation—(a) Merchandise of foreign or domestic manufacture is prohibited importation when it bears a name or mark which copies or simulates a trade-mark or trade name entitled to the protection of the Trade-mark Act of 1905 or the Trade-Mark Act of 1920, unless such merchandise is imported by or for the account of, or with the written consent of, the owner of the protected trade-mark or trade name.
> (b) A name or mark (including a name or mark which is a genuine trade-mark or trade name in a foreign country) on an article of foreign manufacture identical with a trade-mark or trade name protected by

> the trade-mark laws of the United States, as well as a name or mark on an article of foreign or domestic manufacture counterfeiting such protected trade-mark or trade name, or so resembling such protected trade-mark or trade name as to be likely to cause confusion or mistake in the minds of the public or to deceive purchasers, shall be deemed for the purpose of these regulations to copy or simulate such protected trade-mark or trade name. *However, merchandise manufactured or sold in a foreign country under a trade-mark or trade name, which trade-mark is registered under the trade-mark laws of the United States, shall not be deemed for the purpose of these regulations to copy or simulate such United States trade-mark or trade name if such foreign trade-mark or trade name and such United States trade-mark or trade name are owned by the same person, partnership, association, or corporation.* (Emphasis added) *See* T.D. 48539, 70 Treas.Dec. 337.

This provision that a trademark on foreign-manufactured merchandise would not be deemed to copy or simulate a United States trademark if the foreign and domestic trademarks were owned by the same person, partnership, association, or corporation remained in effect from 1936 until 1972 when the regulations were amended.

The currently challenged regulations, embodied in 19 C.F.R. § 133.21(c)(1)-(3), resulted from a rulemaking proposed on December 19, 1970. Although all appropriate steps for agency rulemaking were followed, including the solicitation of public comment, plaintiffs herein did not participate in the proceeding. On October 3, 1972, the Customs Service published a Final Notice (37 Fed.Reg. 20677) adopting these regulations implementing section 526. The revisions were intended to clarify the regulations and to incorporate Customs Service policies and procedures not included in previous regulations.

The 1972 revisions were in response to the decision in the consolidated "perfume" cases, *United States v. Guerlain*, 155 F.Supp. 77 (S.D.N.Y.1957), *vacated and remanded*, 358 U.S. 915 (1958), *action dismissed*, 172 F.Supp. 107 (S.D.N.Y.1959). The theory of the case rested on an antitrust doctrine. The trial court gave judgment for the Government and held that section 526 did not protect a United States company that was part of an international enterprise against importation of the enterprise's goods. On appeal to the United States Supreme Court, the Government asked that the judgment be vacated and the case remanded to the District Court so that the Government could move to dismiss its own case in order that legislation restricting section 526 could be promptly submitted. That was the genesis of a 1959 bill which was introduced to repeal section 526. The Congress did not enact the bill. Thereafter, the challenged regulations were promulgated permitting the unrestricted importation of trademarked products manufactured abroad where both the foreign and American trademark rights are owned by the same company or companies under common ownership.

Since 1951, the Customs Service has issued several letters describing its policy on foreign-manufactured goods bearing trademarks owned by Americans under section 526. The policy of the Customs Service has been consistent that if the United States trademark owner and the owner of the foreign rights to the same mark are one and the same person, articles produced and sold abroad by the foreign owner may be imported by anyone since the trademark owner has itself either introduced or authorized the introduction of the articles into commerce and thereafter may not unreasonably restrict the use of the product. *See* Customs Service Letters dated March 27, 1951, July 2, 1962, March 19, 1963, June 27, 1962, and December 11, 1968. If the foreign producer has been

authorized by the American owner to produce and sell goods abroad bearing the recorded trademark or trade name, merchandise so produced is deemed admissible by the Customs Service. *See* Customs Service Letter dated November 25, 1968.

II.

Plaintiffs contend that the challenged regulations effectively nullify the protection for unauthorized trademark imports that Congress intended United States trademark owners to have. Plaintiffs claim that the statute, clear on its face, is controlling and, contrary to the position of defendants, there is no need to look to the legislative history to determine the intent of Congress. Plaintiffs also allege harm in that the regulations, as interpreted by the Customs Service, permit goods manufactured abroad bearing an authentic U.S. trademark to be imported and sold in the United States by third parties without authorization from the owner of the trademark. These diverted goods, plaintiffs aver, not only are frequently of a different quality, but also are marketed outside the authorized distribution channels responsible for promoting, supporting, and servicing the brand in the United States. Moreover, plaintiffs argue, diverted goods, often sold by discount houses throughout this country, result in revenue loss due to lost sales of products manfactured in this country. Because of the interpretation of these regulations, plaintiffs aver they have suffered a loss of prestige associated with the selection of distributors, diffusion of promotional efforts,- impairment of good will, and the threat of an untimely end to the fashionable aura of the brand name.

It is further claimed that the regulations have resulted in agency inaction and in unlawful limitations on the enforcement of the statute. Plaintiffs insist that the continued introduction of diverted goods will destroy the very

essence of the trademark and the property values it represents by permitting third parties who do not contribute to the advertising efforts and good will identified with the mark to obtain a "free ride" by reaping unfair benefits to themselves. Plaintiffs seek to block middlemen from buying the diverted merchandise cheaply in Europe, importing it into this country, and then underselling the authorized dealers by as much as thirty percent.

In arguing for summary judgment in their favor, defendants contend that the challenged regulations are a correct application of the trademark statutes and that the legislative history demonstrates that it was not the intention of Congress to prohibit importation of diverted goods. Defendants, consistent with their interpretation of the statute, argue that once a trademark owner has authorized the foreign manufacturer to apply the trademark to goods, the trademark owner himself has introduced the articles into commerce and cannot thereafter unreasonably restrict the use of the product. The position of the intervenor-defendants is that the statute has been properly interpreted by the Customs Service and, further, the importing of diverted goods provides consumers with a legitimate alternative.

III

The issue for decision, then, is whether the regulations promulgated by the Customs Service are invalid because they are inconsistent with the statute. As the Supreme Court reiterated in *Federal Election Commission v. Democratic Senatorial Campaign,* 454 U.S. 27, 39, (1981) (citing *Zenith Radio Corporation v. United States,* 437 U.S. 443, 450 (1978), and *Train v. Natural Resources Defense Council,* 421 U.S. 60, 75 (1975)), (1) the task for a court is not to interpret a statute as it thinks best, but rather the narrower inquiry into whether the agency's construction is "sufficiently reasonable" to be accepted by the

reviewing court; and (2) in order to satisfy this standard, it is not necessary for a court to find that the agency's construction is the only reasonable one or even the reading the court would have reached if the question had initially arisen in a judicial proceeding. The pivotal question is whether the construction by the Customs Service, as embodied in the challenged regulations, is sufficiently reasonable. This Court finds that the challenged regulations reflect the Customs Service's long-standing and consistent interpretation of section 526, which interpretation is fully consistent with the intent of Congress in enacting the legislation. This is amply demonstrated by the legislative history of the statute as well as judicial interpretation.

Previous court decisions have construed the statutory language of the Tariff Act to prohibit only the entry of merchandise which copies or simulates registered trademarks and not as a bar to genuine articles. *See Appollinaris Company v. Scherer,* 27 F. 18 (C.C.S.D.N.Y.1886); *Fred Gretsch Mfg. Co. v. Schoening,* 238 F. 780 (2d Cir. 1916). These decisions were followed by *Katzel, supra,* and *Aldridge, supra,* where plaintiffs who held trademark rights conveyed from foreign companies sought to exclude from entry genuine products manufactured in the foreign country and bearing the trademarks. As noted above, the Supreme Court held in *Katzel* that a foreign manufacturer, having sold his business and trademark to a purchaser in this country, could not subsequently come to this country and use his old trademark in competition with that purchaser.

Neither *Aldridge* nor *Katzel* involved the situation in which one and the same party, owning trademark rights in the United States and abroad, authorized the application of the trademark on foreign-made goods and then sought to enjoin importation of those goods which bore the genuine trademark. This latter situation was involved in

United States v. Guerlain, Inc., supra at pages 849-850, which formed the basis of the Customs Service regulations which plaintiffs now challenge.

In addition to judicial decisions construing the statutory language as not barring genuine articles, a pattern of legislative acquiescence has indicated acceptance by the Congress of the Customs Service's interpretation of section 526 by failing to amend that section when legislation closely related to the provision was enacted. In 1978, in connection with the Customs Procedural Reform and Simplification Act of 1978, Pub.L. 94-410, 92 Stat. 903, the House Ways and Means Committee specifically recognized that section 526 "has been consistently interpreted by the United States Customs Service for the past 20 years as excluding from protection foreign-produced merchandise bearing a genuine trademark created, owned, and registered by a citizen of the United States if the foreign producer has been authorized by the American trademark owner to produce and sell abroad goods bearing the recorded trademark." H.Rep. No. 621, 95th Cong., 1st Sess. 27 (1977). Yet, Congress took no action for the purpose of protecting owners of the United States trademarks from importations bearing their own trademarks in such circumstances.

When an agency's interpretation and application of a particular statute are known to Congress, and Congress either amends the statue without affecting the administrative practice or refuses to act at all, the administrative interpretation of the law is presumed to be correct and consistent with Congressional intent. *Haig v. Agee,* 453 U.S. 280, 297-98 (1981). The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367,

381 (1969). In the instant case, Congress is well aware of the Custom Service's policy of permitting importation of diverted goods since at least 1944. It was clearly so informed when it enacted the Lanham Act in 1946 and again when it considered amendments to the Customs laws in 1954. And in 1978, in connection with the Customs Reform and Simplification Act, Congress specifically noted the practice and yet chose not to change it while amending other parts of section 526. Under the circumstances, Congress must be deemed to have approved the interpretation of and practice under section 526. *See Bob Jones University v. United States,* 461 U.S. 574 (1983); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353 (1982); *Zenith Radio Corporation v. United States,* 437 U.S. 443, 450-9 (1978).

Moreover, the policy of the Customs Service of excluding from protection foreign produced merchandise bearing a genuine trademark has been long-standing and consistent. When an agency charged with administering a statute has long adhered to a particular interpretation of its terms, that agency interpretation is entitled to "considerable weight." *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719 (1975); *Accord, Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981); *Federal Trade Commission v. Mandel Brothers, Inc.,* 359 U.S. 385 (1959). It is clear from the existing regulations, that the Customs Service, as the agency charged with the administration of the laws pertaining to entry of imports, has chosen to protect the owners of registered and recorded trademarks against imports of goods bearing the genuine trademark only in those instances in which the owners have not authorized the application of the trademarks abroad either directly or through other parties under their control. To the contrary, in those instances in which owners have authorized the application of the trademarks

abroad, the Customs Service has not accorded protection. The Customs Service interpretation of the statute, as demonstrated through its policies, is long-standing and consistent.

The intervenor-defendant 47th Street Photo presents an additional argument to preclude summary judgment contending that there are genuine issues of material fact in dispute. This argument has been considered but is deemed to be without merit. The Court finds that although there are tangential issues in dispute, they are not genuine issues of material fact touching on the issues to be decided in this case.

The construction of section 526 of the Tariff Act by the Customs Service, as embodied in the challenged regulations, is sufficiently reasonable. This construction is supported by the legislative history, judicial decisions, legislative acquiescence, and the long-standing consistent policy of the Customs Service. The regulations clearly implement the limited purpose for which section 526 was enacted and are consistent with and effectuate the intent of Congress to permit entry of trademarked goods not involving the *Katzel* situation.

For the foregoing reasons and it appearing to the Court that the pleadings, depositions, answers to interrogatories, admissions, and affidavits conclusively demonstrate that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law, the plaintiffs' motion for summary judgment must be denied, and the cross motions of the federal defendants and intervenor-defendant K-Mart must be granted. An Order consistent with this Memorandum Opinion will be entered this date.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 84-0390

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS,

AND

47TH STREET PHOTO K-MART CORPORATION, INTERVENOR-DEFENDANTS.

Dec. 5, 1984

ORDER

Upon consideration of the motion of intervenor-defendant 47th Street Photo to dismiss, plaintiffs' motion for summary judgment, the cross motion of federal defendants for summary judgment, the cross motion of intervenor-defendant K-Mart Corporation for summary judgment, the memoranda submitted in support of and in opposition to the motions, the entire record herein, the argument of counsel, and consistent with the Memorandum Opinion of even date, it is this 5th day of December, 1984,

ORDERED

1. That the motion of the intervenor-defendant 47th Street Photo to dismiss for lack of subject matter jurisdiction be, and hereby is, denied;

2. That the motion of the intervenor-defendant 47th Street Photo to dismiss for failure to state a claim under section 42 of the Lanham Act be, and hereby is, granted;

3. That plaintiffs' claims under section 42 of the Lanham Act be, and they hereby are, dismissed for failure to state a claim upon which relief may be granted;

4. That the motion of the plaintiffs for summary judgment be, and hereby is, denied;

5. That the motion of the federal defendants for summary judgment be, and hereby is, granted;

6. That the motion of the intervenor-defendant K-Mart Corporation for summary judgment be, and hereby is, granted;

7. That judgment be, and hereby is, entered for defendants on the merits of plaintiffs' claim under section 526 of the Tariff Act.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Civil Action No. 84-00390)
No. 84-5890

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed May 6, 1986

JUDGMENT

Before MIKVA, BORK, and SILBERMAN, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
George A. Fisher
Clerk

Date: May 6, 1986
Opinion for the Court filed by Circuit Judge Silberman.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5890

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL.,

v.

UNITED STATES OF AMERICA, ET AL.,

Filed July 18, 1986

ORDER

Before MIKVA, BORK, and SILBERMAN, Circuit Judges.

Upon consideration of the petitions for rehearing of the United States, K-Mart Corporation, and 47th Street Photo, Inc., it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
BY THE COURT:
GEORGE A. FISHER, CLERK

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5890

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL.,

v.

UNITED STATES OF AMERICA, ET AL.,

Filed July 18, 1986

ORDER

BEFORE: Robinson, Chief Judge; Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman, Buckley and Williams, Circuit Judges

The suggestions for rehearing *en banc* of the United States, K-Mart Corporation, and 47th Street Photo, Inc. have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

Per Curiam
BY THE COURT:
GEORGE A. FISHER, CLERK

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Scalia and Williams did not participate in this order.

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